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In the Supreme Court of the United States

OCTOBER TERM, 1956

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,
Appellants,

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC COMPANY,
UTAH RAILWAY COMPANY,
BAMBERGER RAILROAD COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE, GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLANTS' JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLANTS' JURISDICTIONAL STATEMENT

COME NOW the appellants above named and in accordance with the provisisions of Rule 13 (2) of the Rules of the Supreme Court of the United States, submit the following jurisdictional statement in support of their appeal to this court.

A. The opinions issued in this matter by the Court below have not at this time been published in Federal Supplement. The prevailing opinion of Circuit Judge Pickett and Judge Ritter, and the dissenting opinion of Judge Christenson are set forth in full in the appendix hereto.

B. The jurisdiction of this Court is evoked upon the following grounds:

(1) This was an action brought by the appellants for the purpose of annulling and setting aside an Order of the Interstate Commerce Commission under the provisions of Title 49, U.S.C., Section 19 (9) and Title 28, U.S.C. Sections 1366, 1398, 2284, 2321, 2322, 2323, 2324, and 2325 and pursuant to Title 5, U.S.C. Section 1009. The action thus commenced was required by the statutory provisions above quoted to be heard and determined by a District Court of three judges.

(2) The matter was heard by a District Court of three judges. Following the trial of the issues the Court, on the 13th day of June, 1956 made its Findings of Fact, Conclusions of Law and Final Decree denying the permanent injunction sought by the appellants and setting aside the interlocutory injunction theretofore entered in the matter. Said Findings of Fact, Conclusions of Law and Final Decree were filed and entered in the office of the Clerk of the United States Court for the District of Utah on the 18th day of June, 1956. These documents are set forth in the appendix hereto. Appellants' notice of appeal to the Supreme Court of the United States was filed with the United States District Court for the District of Utah on the 10th day of July, 1956.

(3) Title 28, U.S.C. 1253 covers jurisdiction of this Court to entertain a direct appeal from such Final Decree. Said Title 28, U.S.C. 1253, provides as follows:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and de-

termined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

(4) The jurisdiction of this Court to consider such appeal was expressly upheld in the following cases: United States v. Hancock Truck Lines, Inc., et al, 324 U.S. 774; 89 L ed 1357; Interstate Commerce Commission v. Hoboken Manufacturers, 320 U.S. 368; 88 L ed 107. Although the question of jurisdiction was not specifically raised or passed upon, the Court in the following recent cases has taken jurisdiction of appeals from similar orders. Louisiana Public Service Commission v. United States, 348 U.S. 889; 99 L ed 696, rehearing denied 348, U.S. 921; 99 L ed 723. Mississippi Public Service Commission v. United States, 349 U.S. 908, 99 L ed 1244; State of North Carolina et al v. United States, et al, 350 U.S. 805, 100 L ed 46.

C. The questions presented by this appeal are as follows:

(1) Were the findings of the Interstate Commerce Commission challenged in the above entitled case supported by substantial evidence?

(2) May the court sustain the Interstate Commerce Commission's Order, without further evidence on the following:

(a) The presumption that interstate and intrastate rates were in proper relationship prior to the increase;

(b) The matter of common knowledge that intrastate and interstate traffic are intermingled on the same trains.

(3) May the Interstate Commerce Commission and the Court ignore the evidence of the protestants which detracts from the evidence of the railroads.

(4) May a collateral attack be made in this action upon the Interstate Commerce Commission Order in Ex Parte No. 175.

STATEMENT OF FACTS

In a proceeding entitled "Increased Freight Rates 1951" which will hereinafter be referred to as Ex Parte 175, the Interstate Commerce Commission in two preliminary orders and one final order granted to the Class I railroads of the United States permission to increase their interstate freight rates and charges a total of 15%. Thereafter the Class I railroads operating in and through the State of Utah made application to the Public Service Commission of Utah for similar increases on Utah intrastate rates. At the conclusion of the hearing before the Public Service Commission of Utah, the Commission ruled that the railroads had failed to present evidence warranting an increase in the Utah intrastate rates and dismissed the proceedings "without prejudice to applicants to apply for further hearing for the presentation of further evidence." The railroads made no further presentation of evidence before the Utah Public Service Commission, nor did they appeal to the Supreme Court of the State of Utah from the order as entered; rather they made application to the Interstate Commerce Commission under the provisions of 49 U.S.C. 13(3)(4) to allow the intrastate increases.

Pursuant to this petition, the Interstate Commerce Commission entered into an investigation of the Utah intrastate freight rates under I.C.C. Docket No. 31484. The appellants before this court appeared as protestants before the Interstate Comerce Commission. Following hearings on the matter, the Interstate Commerce Commission in a report issued on the 17th day of October, 1955 found that existing Utah intrastate rates and charges were abnormally low and that traffic thereunder failed to produce its fair share of earnings required to yield the respondent railroads' required revenue, and further

that the burden thus case upon Interstate Commerce was undue in and to the extent that the intrastate rates and charges were less than those recommended in the report.

A petition for rehearing was made and denied and on the 8th day of February, 1956, the Interstate Commerce Commission ordered into effect the 15% increase on Utah intrastate rates to become effective as of the 13th day of March, 1956. The appellants then brought their action in the United States District Court for an injunction setting aside the Interstate Commerce Commission order. A temporary restraining order and later a preliminary injunction were granted which kept the higher rates from going into effect pending the decision of the case on its merits. As pointed out above, in the final decree the Court refused the permanent injunction and set aside the temporary injunction. At the hearing before the United States District Court for the District of Utah, the entire transcript of the proceedings before the Interstate Commerce Commission in Docket No. 31484 including exhibits, was introduced in evidence and it was on the basis of this evidence that the parties sought relief. The evidence before the Interstate Commerce Commission in Docket No. 31484 fell into four general categories:

1. Operating statistics of the railroads.

2. Comparative interstate and intrastate rates.

3. Similarity of intrastate and interstate operating conditions.

4. General economic study of Utah.

1. *Operating statistics of the railroads.*

The railroads introduced evidence as to the systemwide

operating figures of the roads in question. No break-down of the figures between Utah operations and systemwide operations was made. These figures showed an average rate of return systemwide on the roads in question of slightly less than 4% for the years 1950 to 1953 if the railroad figures were taken at their face value, and an average return of about 4.6% if certain adjustments were made to make these studies conform with the ones introduced in Ex Parte 175.

The protestants presented evidence to show the Bamberger Railroad Company, the principal one of the appellant railroads operating entirely within the state of Utah, showed a rate of return in 1953 of 15.98%. Protestants also presented a study breaking down the operating figures of the interstate roads in question between systemwide and Utah operations, which study showed a materially lower operating ratio on the Utah operations.

2. *Comparative interstate and intrastate rates.*

Rate studies were introduced both by the railroads and the protestants. These studies show, that in some cases comparable interstate rates were lower than intrastate rates but in the great majority of cases the intrastate rates were already higher without the 15% increase than were the interstate rates including such increase.

3. *Similarity of intrastate and interstate operating conditions.*

The railroads introduced several witnesses who testified generally that intrastate and interstate freight was handled on the same cars, over the same rails, by the same platform crews and was accounted for by the same accounting department. The

protestants introduced evidence which showed that the density of traffic on shipments within the state of Utah was materially higher than the density of traffic systemwide on the railroads making application for intrastate increases.

4. *Economic conditions in Utah.*

Studies introduced by the railroads showed that in recent years the economy of Utah has changed from a primarily agricultural and mining economy to an industrial economy.

ARGUMENT

The principal matter presented to this court by this appeal has never been decided previously by this court and is of importance, not only in this case, but is important to all state regulatory commissions to aid them in determining just what are their powers and duties in regard to intrastate rates. Since the decision of this court in King v. United States, 344 U.S. 254, 97 L ed 301, the railroads have become more and more brief and summary in their presentation of evidence in Section 13 cases, as is well evidenced by the type of evidence presented in this case. If the type of evidence presented in this case is sufficient to permit the Interstate Commerce Commission to take jurisdiction of intrastate rates, the effect will be, in all cases, to make the state regulatory commissions mere rubber stamps for the Interstate Commerce Commission in the matter of fixing intrastate rates.

As was stated by Judge Christenson in his dissenting opinion:

"The rationale of the decision would mean that increases applied nationwide by the Interstate Commerce

Commission, coupled with matters of common knowledge and unwarranted presumptions concerning the interrelationship of interstate and intrastate traffic, automatically justify corresponding intrastate increases at the will of the Interstate Commerce Commission—a result at once inconsistent with the relationship between affairs national and local, at variance with controlling decisions, and not in keeping with the national transportation policy itself."

It is not true as the appellees stated in their motion to dismiss heretofore filed, or as the majority opinion implies that the appellants here maintained that the railroads have failed in their proof merely because they have failed to break down their operating figures between interstate and intrastate operations. We urged to the lower court and urge here that that is one method by which the railroads might prove their need for intrastate increases. However, this court in the case of King v. United States; supra, and also in the case of Illinois Commerce Commission v. United States, 292 U.S. 474, 78 L ed 1371, approved another method of proving the need for intrastate increases. As was stated in the Illinois case:

"Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

The question here presented for determination is - What is meant by the term "with respect to all factors bearing on the reasonablenes of the rate"? The railroads in Docket No. 31484 before the Interstate Commerce Commission established that the railroads handled interstate and intrastate freight in the same manner without distinction. This, however, was not a matter that required any evidence. It is a matter of common

knowledge to anyone who has the least knowledge about railroad operations. It is a matter of which the Commission and the courts should and have taken judicial notice. To rely entirely on such state of facts to establish that "all factors bearing on the reasonableness of the rate" are the same, ignores the all important element of density of traffic. It is also a matter of common knowledge that as the density of traffic over a given line increases, the unit cost of operation decreases. This results from the fact that while variable costs will bear the same on each unit of traffic regardless of the amount of traffic moved, the total fixed costs will remain substantially the same, regardless of the volume of traffic, and will bear less heavily on each unit of traffic moved as the volume of traffic increases. The railroads introduced no evidence at all on the question of density of traffic. The only evidence on this point came from the protestants before the Interstate Commerce Commission, who established that the volume of traffic was materially heavier within the state of Utah than it was system-wide on the roads in question.

If the railroads introduced any other evidence than general testimony as to similar methods of handling interstate and intrastate traffic touching upon the identity of factors bearing upon the reasonableness of rates, appellants are unable to discover it. It is the only evidence specifically referred to by the Interstate Commerce Commission in its report and the only evidence specifically referred to by the United States District Court for the District of Utah in its majority opinion.

As was stated by Judge Christenson in his dissenting opinion,

> "Except for general references to the similarity of conditions as between intrastate and interstate commerce and

certain unsupported conclusions discounting the effect of the affirmative evidence adduced on behalf of those opposing the increase, the facts set out in these subsidiary findings seem to recognize a substantial difference in conditions affecting rates."

The Interstate Commerce Commission makes a finding which is adopted by the court both in its Findings of Fact and in the majority opinion to the effect that:

> "The cost of handling the intrastate shipments was found to be as great if not greater than the handling of interstate freight."

However, neither the Interstate Commerce Commission Report, the Court's Finding of Fact, nor the Majority Opinion identify such evidence. Furthermore, the railroads have never pointed out any such evidence in any of their briefs in this proceeding. If such evidence exists in the record, appellants have been unable to find it. Likewise, Judge Christenson, whose minority opinion reflects a great deal of study of the record in this case, was unable to find such evidence. After searching the record for such evidence, Judge Christenson concluded:

> "The evidentiary basis in the record of the statement that a positive showing was made that the average unit expense of servicing Utah intrastate traffic is at least as great as that of servicing interstate traffic to and from Utah, cannot be found in the transcript, nor can I find it referred to in the briefs of the respondents. The record seems devoid of a comparison of conditions bearing on the reasonableness of rates, except for such common factors as were held in the first North Carolina case to be insufficient in the findings to support an order. It does not seem enough for the Commission to point to evidence of admitted differences in relevant factors and to say that the differences are not as great as those opposing the increases claim, without some basis in the record upon which to premise a finding that the differences are not substantial."

In the case of North Carolina v. United States, 325 U.S. 507; 89 L ed 1760, this Court held that mere disparity in interstate rates is not enough to warrant the Interstate Commerce Commission in taking jurisdiction of intrastate rates. However, because the Interstate Commerce Commission and the United States District Court in the majority opinion discussed to some extent the matter of disparity of rates, appellants desire to comment thereon in this brief. Rate studies were introduced by the railroads and also by the protestants before the Interstate Commerce Commission in regard to rates on coal. From this evidence it appears that in some instances interstate coal rates having a comparable haul are lower and in some instances higher than comparable intrastate rates.

The railroads introduced a study on class rates which showed that interstate rates out of Salt Lake were higher than intrastate rates out of Salt Lake for a similar distance. Protestants, however, introduced evidence to show that the interstate class rates were mere paper rates for the reason that there were in effect merchandise rates on intrastate traffic which was actually moving the traffic out of Salt Lake which would otherwise have moved on the class rates. These interstate merchandise rates were lower than the intrastate class rates. There were no comparable intrastate merchandise rates. Therefore, traffic which normally moves on class rates could move out of Salt Lake City interstate for a lower rate including the 15% increase than could similar goods moving intrastate for a comparable distance without the 15% increase.

Before the Interstate Commerce Commission, the railroads' witness Watson introduced some 20 exhibits on which were listed intrastate rates and interstate rates covering the some commodities. By and large the interstate shipments were

so long and the intrastate shipments were so short that very little could be gained by way of comparison. In the few instances where comparable distances were shown the intrastate rates were shown to be higher without the 15% increase than were the interstate rates, including the 15% increase. When cross-examined in this regard, the witness Watson stated that his exhibits were not intended as comparative rate studies, but were merely the basis for building up the railroads' estimate that the increases sought on Utah intrastate rates would yield the railroads an additional $1,800,000.00 revenue. With this latter proposition the appellants here have never taken issue.

The railroads introduced evidence as to the average revenue per ton mile on intrastate shipments systemwide on the roads as compared to the average revenue per ton mile on Utah intrastate shipments. Considerable was made of this study both by the Interstate Commerce Commission in its report and by the majority opinion in the court below. This study showed that the average revenue per ton mile was 1.43c for railroads in the United States, 1.393c in the Western District, 1.398c per ton in the Mountain-Pacific states and only 1.258c per ton in the state of Utah. Both the Commission and the Court overlooked the admissions on cross examination of witness Kroll, who introduced this study to the effect that the consistency of the traffic within the state of Utah was weighed much more heavily in favor of the lower revenue, lower cost products of the mine than were the other figures. These figures clearly appear to be subject to the criticism of Judge Christenson as follows:

> "Comparative revenue figures per ton mile covering interstate and intrastate traffic lumped together without taking into consideration differences affirmatively shown to exist in factors affecting the respective costs, again may

have a bearing on other phases of a rate case, but furnish no rational basis for concluding that all factors affecting costs are substantially the same for interstate and intrastate traffic, * * * "

The report of the Interstate Commerce Commission and the majority opinion both brushed aside the showing of protestants that on like commodities when shown separately, the revenue per ton mile on Utah intrastate shipments was considerably higher without the 15% than was the revenue per ton mile on interstate shipments having Utah as a point of origin or destination. Let us assume, however, for purposes of this brief, that the Interstate Commerce Commission could have found under the evidence that a 15% increase was necessay in Utah intrastate rates to bring them up to the level of interstate rates. Still, as pointed out in Notrh Carolina v. United States, Supra, this alone is not enough to jusdify the Interstate Commerce Commisson in taking jurisdiction. In addition to that they must establish:

(a) The railroads making the application have an overall need for additional revenue. (Which we agree the Commission could find from the evidence introduced.)

(b) That all factors bearing upon the reasonableness of the rates are substantially the same as affecting interstate and intrastate rates.

On this last point we maintain that the evidence introduced before the Interstate Commerce Commission fails completely. If the burden of proving this last point is met by the facts as set out in Finding of Fact No. 14, then there was no need whatever for the Utah Commission to hold a hearing or for the Interstate Commerce Commission to hold a hearing on the 13th Section application, because in effect the matter as to Utah

intrastate rates and the intrastate rates of every other state in the union had already been decided in Ex Parte 175.

In the case of Mississippi Public Service Commission v. United States of America and the Interstate Commerce Commission, 124 Fed. Supp. 809, in a decision affirmed by this Court, 349 U. S. 908, 99 L ed 1244, the Court stated:

> "The record shows that in making the investigation for the nation as a whole in Ex Parte No. 175, that the Commission at that time was making a determination that the intrastate rates should be increased as well as the interstate rates. This will not do. There must be a finding based upon substantial evidence after a full investigation that the intrastate rates are abnormally low and that traffic thereunder fails to produce its fair share of the earnings to yield revenue sufficient to accomplish the purpose of interstate commerce. The record does not bear out any substantial evidence to this effect. There was no separation made by the railroads of their revenues, expenses and properties as between interstate and intrastate operations. So far as the record shows, it could be fairly assumed that the rates fixed by the Mississippi Commission were not abnormally low but were bearing a fair percentage of revenue for the operation of the carriers."

While appellants do not agree with the Mississippi case, if the court is implying that a division of revenue, interstate and intrastate is the only method for the railroads to prove the need for additional intrastate revenue, certainly the above quotation is very much in point where the railroads neither divide their operating statistics between interstate and intrastate operations, nor do they prove that all factors touching the reasonableness of the rates are the same interstate and intrastate.

This court has held that the mere showing that railroads intermingled interstate and intrastate shipments is not enough

to warrant the Interstate Commerce Commission in taking jurisdiction of intrastate rates. In the case of Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 95 L ed. 1002, this Court stated:

> "Appellee conducts an interstate business over the same tracks and by means of the same trains involved in this case, and such interstate activities are regulated by the Federal Interstate Commerce Commission, 49 USC Sec. 1, et seq. But, it has long been held that this interblending of the interstate and intrastate operations does not deprive the states of their primary authority over intrastate transportation in the absence of congressional action supplementing that authority."

CONCLUSION

The principal issue presented by this appeal is clear cut. It is this - Does the mere showing that railroads intermingle interstate and intrastate traffic on the same equipment meet the test of the King case and the Illinois case to show that all factors touching the reasonableness of rates are the same? If so, there was sufficient evidence in the record to sustain the findings. If not, there was not. It will not require this court to examine the large volume of evidence before the Interstate Commerce Commission. It will merely require that the appellees refer in the record to any other evidence than that above mentioned which sustained the finding as to identity of circumstances under which interstate and intrastate traffic move, a thing which Judge Christenson says the appellees did not do for the court below. Appellants are not asking this court to weigh the evidence, we are merely asking the court to see if the appellees can point out any evidence which could sustain the findings.

Again appellants urge that if the mere fact that the traffic is intermingled is sufficient to establish the "sameness of conditions," then indeed there is no jurisdiction of intrastate rates left in the state commissions. The courts and the commission can take judicial notice of the intermingling of traffic. Therefore, as quickly as the need for an overall increase in revenue is established in ex parte interstate proceedings, the jurisdiction of the Interstate Commerce Commission over intrastate rates is immediately established. This is a matter which in the public interest needs clarification, not merely by granting a motion to affirm but after full hearing and argument. If the power of the states to regulate intrastate rates is in fact dead, then it should be buried.

Respectfully submitted,

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PROOF OF SERVICE

I, CALVIN L. RAMPTON, counsel of record for appellants, and a member of the bar of the Supreme Court of the United States, hereby certify that on the .... day of August, 1956, I served, on behalf of the appellants herein, copies of the foregoing Appellants' Jurisdictional Statement, as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Stanley N. Barnes, Assistant Attorney General, Department of Justice, Washington, D.C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Charles H. Johns, Assistant Counsel, at the offices of the Commission, Washington, 25, D.C.

3. On the intervening defendants by mailing copies in duly addressed envelopes, with first-class postage prepaid, to their respective counsel of record as follows:

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL ACTION NO. C-8-56

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants;

and

UNION PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, BAMBERGER RAILROAD COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, SALT LAKE-GARFIELD AND WESTERN RAILROAD COMPANY, TOOELE VALLEY RAILWAY COMPANY, and UTAH RAILWAY COMPANY,

Intervenors.

OPINION

E. R. Callister, Attorney General; Raymond W. Gee, Deputy Attorney General; Keith E. Sohm, Commerce Attorney, Salt Lake City, Utah, for plaintiff Public Service Commission; Calvin L. Rampton, Salt Lake City, Utah, for plaintiff Utah Citizens Rate Association;

Stanley N. Barnes, Assistant Attorney General; James E. Kilday, E. Riggs McConnell, Attorneys Department of Justice, Washington, D.C., and A. Pratt Kesler, United States Attorney, Salt Lake City, Utah, for defendant United

States of America; Robert W. Ginnane, General Counsel, Charlie H. Johns, Assistant Counsel, I. C. C., Washington, D. C., and George W. Howard, Salt Lake City, Utah, for defendant Interstate Commerce Commission;

Bryan P. Leverich, S. N. Cornwall, A. H. Nebeker, Peter W. Billings, John H. Snow, A. S. Frederickson, and J. E. Morgan, Salt Lake City, Utah, for Inetrvening Defendants.

BEFORE PICKETT, United States Circuit Judge, RITTER, Chief Judge, and CHRISTENSON, United States District Judges.

PICKETT, United States Circuit Judge.

The Public Service Commission of the State of Utah and the Utah Citizens Rate Association brought this action to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission granting an increase of intrastate freight rates in Utah in a proceeding under Sec. 13 (3) and (4) of the Interstate Comerce Act. 49 U. S. C. A., Sec. 13 (3), (4).[1] The Class I railroads operating in Utah intervened. A statutory three-judge court was constituted and an interlocutory injunction granted pending a hearing on the merits of the case.

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1 49 U. S. C. A., Sec. 13(4), reads as follows:

"Whenever in any such investigation the commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes an undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The underlying proceedings which give rise to this action originated in 1951 before the Interstate Commerce Commission, entitled "Increased Freight Rates 1951," herein referred to as "Ex Parte 175," wherein Class I railroads of the United States sought an overall increase in interstate freight rates. After some percentage increases had been authorized, the Commission, on April 11, 1952, granted increases totaling 15% to all railroads on interstate rates, 284 I. C. C. 589. This increase was subject to certain exceptions and hold-downs. The railroads operating in Utah made application to the Public Service Commission of Utah for increases in intrastate rates in the same percentage as those granted in Ex Parte 175.

The Utah Commission refused to grant the increases and Section 13 proceedings were instituted before the Interstate Commerce Commission, which entered into an investigation of the Utah intrastate rates. A full and complete hearing was had, at which evidence was offered by the railroads and by protestants, including these plaintiffs. The Interstate Commerce Commission, with exceptions, found that the Utah intrastate rates and charges were abnormally low; that conditions incident to intrastate transportation in Utah were not more favorable than those incident to interstate transportation in that state; that traffic thereunder failed to produce its fair share of earnings required to yield the railroads sufficient revenue to provide adequate and efficient railway transportation service to accomplish the purposes of the Interstate Commerce Act, and that Utah intrastate rates cast an undue burden upon interstate commerce. 297 I. C. C. 87.[2] It was also found that

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2 The Commission's findings (297 I. C. C. 105), are as follows:

"1. The conditions incident to the intrastate transportation freight in Utah are not more favorable than those incident to the

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the undue burden and unjust discrimination should be removed by applying to the Utah intrastate rates and charges the interstate increase authorized in Ex parte 175 on like intrastate traffic. The increases, however, were limited by the provision "that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroad, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor-carrier competition." It is conceded that the findings

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interstate transportation between Utah and adjoining States.

"2. The amounts and percentages by which interstate freight rates and charges between points in Utah and points in other States were increased, as authorized in Ex Parte No. 175, are just and reasonable.

"3. The present Utah intrastate rates and charges on carload and less-than-carload freight, except on sugar beets and beet-sugar, final molasses destined to sugar factories, and excepting certain rates on coal, sheep, and cattle, hereinafter enumerated, imposed by authority of the State, are abnormally low, and traffic thereunder fails to produce its fair share of the earnings required to yield revenue sufficient to enable the respondents, under honest, economic, and efficient management, to provide adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and thereby accomplish the purposes of the Interstate Commerce Act, as set forth in the National transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense. The burden thus cast upon intrastate rates and charges are less than they would be on the bases herein prescribed; and these intrastate rates and charges cause, and for the future will cause, undue, unreasonable, and unjust discrimination against interstate commerce.

"4. The undue, unreasonable, and unjust discrimination herein found to exist should be removed by applying to the Utah intrastate rates and charges, on the commodities and traffic herein described, the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic between points in Utah and adjoining States under our authoriza-

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meet the requirements of King v. United States, 344 U. S. 254, but it is urged that the evidence does not sustain them.

The Utah Commission did not authorize the increases within the time provided in the order and the railroads were then directed by the Interstate Commerce Commission to make the 15% increase effective on Utah intrastate rates as of March 13, 1956. This action followed.

The matter is before us on the record of the Interstate Commerce Commission proceedings under Section 13. At the

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tion in Ex Parte No. 175, provided that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from Utah for like or greater short-line distances over the same lines of railroad, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor-carrier competition.

"5. The establishment of increases in intrastate rates and charges as prescribed in finding 4 will not result in unreasonable rate, or rates that are unreasonable in relation to interstate rates, and will substantially increase the respondents' annual revenues.

"6. The increased revenues to the respondents which will result from the increased rates and charges as provided in finding 4 are required from intrastate traffic in Utah in order to enable the respondents to provide adequate and efficient railway transportation service.

"7. In certain instances it appears that the present Utah intrastate rates are now as high as corresponding interstate rates, including the Ex Parte No. 175 increases for comparable distances. The intrastate rates specified below, are excepted from the findings herein:

"Rates on coal, viz:

"From Castle Gate to Milford, Utah, slack and other sizes.

"From Castle Gate to Lund, Utah, slack and other sizes.

"From Castle Gate to Devil's Slide, Utah, slack.

"Rates on sheep, in double-deck cars, viz:

"From Lakeside to Wasatch, Utah.

"From Cedar City to Kaysville, Utah.

"Rates on cattle, in single-deck cars, viz:

"From Spanish Fork to Ogden, Utah."

opening of the trial the plaintiffs introduced in evidence the Interstate Commerce Commission records and, in addition, offered the record of proceedings made before the Public Service Commission of Utah. The court reversed ruling on the admissibility of the latter record, which had not been introduced in the proceedings before the Commission. It is well settled that when an order of the Interstate Commerce Commission is questioned in an action of this nature, the court shall consider only such matters as were before the Commission prior to the issuance of its order. Tagg Bros. & Moorehead v. United States, 280 U. S. 420, 443; Louisville & Nashville R. Co v. United States, 245 U. S. 463, 466; New York v. United States, 331 U. S. 284, 335; Sakis v. United States, 103 F. Supp. 292, App. Dismissed, 344 U. S. 801. The record in the State proceeding is irrelevant and the objection to its admission in evidence is sustained.

The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove unjust discrimination against interstate commerce is not open to dispute. The plaintiffs here do not question that power, although they do question the reasonableness of the increases in Ex Parte 175. See King v. United States, 344 U. S. 254, 274; Florida v. United States, 282 U. S. 194, 211. It appears quite clear that Congress intended that the railway system of the country shall have a reasonable return to carry out the purposes of the Interstate Commerce Act, which would include compensation for intrastate business reasonably proportionate with the interstate business. Wisconsin R. Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 588; Illinois Commerce Commission v. United States, 292 U. S. 474, 483. The fundamental purpose of the Congress in enacting Section 13, subdivisions (3) and (4), was to reach intrastate rates that were found to

result in unjust discrimination against interstate commerce. Florida v. United States, 282 U. S. 194, 210. The purpose of Section 13(4) is not limited to the removal of unjust and unreasonable discriminations against interstate commerce as it relates to persons and localities, but it imposes on the commission the affirmative duty "to take other important steps to maintain an adequate railway service for the people of the United States." Wisconsin R. R. Commission v. C., B. & Q. R. Co., 257 U. S. 563, 585; Florida v. United States, 282 U. S. 194.

In determining the validity of an order of this nature, a reviewing court may not weigh the evidence; it may not negative the action of the Commission, being "one of those agencies presumably equipped or informed by experience to deal with the specialized field of knowledge ,whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect," if from a consideration of the entire record there is a rational basis for the action. Universal Camera Corp. v. Labor Board, 340 U. S. 474, 488. The court may set aside the order, "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's View." Universal Camera Corp. v. Labor Board, supra.

In Interstate Commerce Commission v. Jersey City, 322 U. S. 503, 513 ,it was said: "* * * 'So long as there is warrant in the record for the judgment of the expert body it must stand. * * * The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' Rochester Telephone Corp. v. United

States, 307 U. S. 125, 145-146; Miss. Valley Barge Line Co. v. United States, 292 U. S. 282, 286-87."

The principal contention of the plaintiffs is that the evidence does not sustain the finding that the existing intrastate rates cause undue, unreasonable and unjust discrimination against interstate commerce. It is said that the evidence fails because there has been no separation of interstate and intrastate costs and revenues. The evidence is to the effect that there is no distinction in the handling of interstate and intrastate freight shipments. They are both handled on the same trains, by the same crews; the same accounting department, the same traffic department, and the same facilities are used in the dispatch of both shipments. Under such conditions, the contention of the plaintiffs has been rejected by the courts. King v. United States, supra; Illinois Commerce Commission v. United States, supra; State of North Carolina v. United States, 128 F. Supp. 718, Aff. 350 U. S. 805. In the Illinois Commerce case, the court said (292 U. S. 474, 483-484):

> "Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues."

This does not mean that there must be a uniformity in interstate and intrastate rates. Intrastate transportation is primarily the concern of the state. The Interstate Commerce Commission is without authority to supplant intrastate rates unless there are findings supported by evidence that conditions exist which may bring Sec. 13(4) into play. To authorize an interference with intrastate rates, it must be shown that the

intrastate and interstate traffic are intimately bound together; that the conditions incident to intrastate transporation are no more favorable than those incident to interstate traffic, and that the intrastate rates involved are abnormally low and are not contributing their fare share of the revenue to which the railroads are entitled. The mere existence of a disparity in rates is not enough to warrant interference by the Interstate Commerce Commission. North Carolina v. United States, 325 U. S. 507, 516. The State Commission has complete control of intrastate rates so long as those rates do not unduly burden or discriminate against interstate commerce.

In finding that such a burden and discrimination existed, the Commission did not rely entirely on the disparity in rates. It was shown that the conditions under which interstate and intrastate traffic move were substantially the same with respect to all factors bearing on the reasonableness of the rates. The railroads' general need for additional revenue was established in Ex Parte 175. There is evidence to the effect that the earnings on the railroads' investments in Utah are below the national average. The economic ability of the Utah traffic to bear the 15% increase found necessary in Ex Parte 175 was shown. The economic conditions in Utah in 1950 had improved greatly over the preceding period, both actually and relatively. Wages were higher than the national average; higher wages and costs of operation which the railroads had to pay in Utah and elsewhere were shown; there had been a substantial increase in the railroads' property investment in the State while there was a decrease in net operating income. The cost of handling intrastate shipment was found to be as great, if not greater, than the handling of interstate freight. The percentage of return on net investment of the railroads in Utah was 3.82% in 1953, as compared with 3.98% in 1948, 2.58% in 1949; 4.33% in

1950, 3.66% in 1951, and 3.91% in 1952. The record also shows that in 1952 the revenue per ton mile of railroads in the United States was 1.43 cents; in the Western District, 1.393 cents; and in the Mountain Pacific states, which includes Utah, 1.398 cents per ton mile; and in the State of Utah, on intrastate and interstate traffic, 1.258 cents per ton mile. The total annual loss to the railroads caused by the failure to grant the requested increase in Utah was estimated at $1,880,347.[3]

In State of North Carolina v. United States, 128 F. Supp. 718, Aff. 350 U. S. 805, the state sought to nullify an order of the Interstate Commerce Commission, applying the Ex Parte 175 rates to intrastate freight in North Carolina. There may be some varying conditions, but on the whole the case was the same as the one before us. In answering the argument that the record did not disclose that the intrastate rates resulted in an undue discrimination against interstate commerce, the court said (P. 722, 723):

> "Plaintiffs contend that there was no sufficient showing of discrimination against interstate commerce and in favor of intrastate commerce resulting from the intrastate rates. It appears, however, that, without the Ex Parte

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3/ In Illinois Commerce Comm'n. v. United States, 292 U. S. 474, 479, the court said:

> "The scope and application of Sec. 13(4) have so recently been fully considered in opinions of this Court in United States v. Louisiana, 290 U. S. 70; Florida v. United States, ante, p. 1; see also Georgia Public Service Comm. v. United States, 283 U. S. 765; Florida v. United States, 282 U. S. 194; that it is unnecessary to repeat that discussion here. Under 13(4) of the Interstate Commerce Act, the Interstate Commerce Commission is given plenary power to remove the discrimination created by intrastate rates so that the intrastate traffic may produce its fair share of the revenue required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service."

No. 175 increases on any of their traffic in 1953, the return on net investment in 1953 for the four principal carriers receiving 87% of the intrastate revenue would have been 0.94% for the Norfolk Southern, 4.63% for the Seabord, 4.35% for the Southern and a deficit of more than $4,000,000 for the Atlantic Coast Line, or a combined return for the four roads of 2.84%. This is not a case, then, as plaintiffs argue, where an unnecessary increase was granted in a prosperous territory because of a need in other sections. The need for increase existed in North Carolina as these figures show, and the Commission estimated that the total loss from the non-application of the increase in 1953 was $1,500,000. As the cost of handling intrastate freight was shown to be as great as or greater than the handling of interstate freight, the raising of interstate rates without raising intrastate rates necessarily resulted in throwing an undue share of the cost of the service upon interstate transportation. As said by Mr. Justice Stone in Illinois Commerce Commission v. United States, 292 U. S. 474, 485, 54 S. Ct. 783, 787, 78 L. Ed. 1371, 'The effect of maintaining a lower rate, intrastate, than the reasonable interstate rate is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions.'

"In Railroad Commission of State of Wisconsin v. Chicago, B. & Q .R. Co., 257 U. S. 563, 568, 42 S. Ct. 232, 236, 66 L. Ed. 371, Chief Justice Taft, speaking for the court, said:

> " 'If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. * * * If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, and unjust discrimination against in-

tersfate or foreign commerce" within the ordinary meaning of those words.' * * * "

In similar cases concerning the same matter, Louisiana Public Service Commission v. United States, 125 F. Supp. 180, Aff. 348 U. S. 885, sustained the order of the Interstate Commerce Commission, and Mississippi Public Service Commission v. United States, 124 F. Supp. 809, Aff. 349 U. S. 908, with one judge dissenting, set aside and enjoined the enforcement of the order.

Plaintiffs' contention that the order relating to the Utah intrastate rates is invalid because of the flat percentage increase of 15% in Ex Parte 175, with a savings clause, was contrary to law, is without merit. The validity of the Commission's order in Ex Parte 175 is not subject to a collateral attack. Callanan Road Co. v. United States, 345 U. S. 507, 512; Securities & Exchange Commission v. Central-Illinois Securities Corp., 338 U. S. 96, 143; City of Tulsa v. Midland Valley R. Co., 168 F. 2d 252. The determination of just and reasonable rates is for the Commission, not the courts. Montana-Dakota Utilities Co. v. Public Service Commission, 341 U. S. 246, 251; Swayne & Hoyt. Ltd. v. United States, 300 U. S. 297, 304; Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470; Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481; Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. The courts, in appropriate cases, have upheld flat horizontal percentage rate increases which contained a savings clause to prevent injustices. United States v. State of Louisiana, 290 U. S. 70; The New England Divisions Case, 261 U. S. 184, 187; Wisconsin R. Commission v. Chicago, B. & Q. R. Co., supra.

The plaintiffs urge that the record discloses that the Utah

intrastate rates, without the 15% increase, are contributing more, not less, than their fair share of the overall revenue needs of the railroads. The Commission did not so find. While the exhibits, in some instances, show intrastate rates equal to or even higher than interstate service, this may result from varying causes which are not material here. The clear import of the Commission's order is that increases in intrastate rates shall not be made to levels higher than interstate rates for like traffic. The order is also without prejudice to a reexamination as to the lawfulness of any individual Utah intrastate rate on any particular commodity.

We have considered the voluminous record and conclude that the findings of the Commission are supported by substantial evidence. The complaint is dismissed and the interlocutory injunction dissolved; costs to be assessed to the plaintiffs.

Dated this 23 day of May, 1956.

/s/ John C. Pickett
Circuit Judge

/s/ Willis W. Ritter
District Judge
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL ACTION NO. C-8-56

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants;

and

UNION PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, BAMBERGER RAILROAD COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, SALT LAKE-GARFIELD AND WESTERN RAILROAD COMPANY, TOOELE VALLEY RAILWAY COMPANY, and UTAH RAILWAY COMPANY,

Intervenors.

CHRISTENSON, District Judge (Dissenting)

I dissent from the holding of the majority that there is substantial evidence in the record supporting the order of the Interstate Commerce Commission in this case. There is agreement upon all of the other points decided and with the statement of principles contained in the prevailing opinion. It is submitted, however: (I) that the Decisions of the Supreme Court of the United States do not warrant the applications made; (II) that the record itself does not furnish any substantial basis for the Commission's ultimate findings; (III) that to bring the case within the doctrine of *Illinois Commerce Com-*

mission et al v. United States et al., 292 U. S. 474; 54 S. Ct. 783, 78 L. Ed. 1371, unauthorized presumptions would have to be indulged and evidence not before the Court would have to be assumed; and (IV) that the rationale of the decision would mean the increases applied nationwide by the Interstate Commerce Commission, coupled with matters of common knowledge and unwarranted presumptions concerning the interrelationship of interstate and intrastate traffic, automatically justify corresponding intrastate increases at the will of the Interstate Commerce Commission—a result at once inconsistent with the relationship between affairs national and local, at variance with controlling decisions, and not in keeping with the national transportation policy itself. The far-reaching issue thus presented will excuse—I believe that it requires—my presuming to state views on the foregoing points as they differ from those of my respected colleagues.

I.

The prevailing opinion properly recognizes that there need not be uniformity in interstate and intrastate rates; that intrastate transportation is primarily the concern of the state; and that the Interstate Commerce Commission is without authority to supplant intrastate rates unless there are findings supported by evidence that conditions exist which bring Section 13(4) of the Interstate Commerce Act, 49 U. S. C. A. 13(4), into operation. The most direct and positive way to show jurisdictional facts in dispute here would be to break down operating figures, both as to income and expense, on an intrastate basis in order to permit comparison with corresponding interstate figures. The railroads have said that this is impracticable, and no doubt it is in many cases. The decision in *Illinois Commerce*

et al. v. United States et al. supra, dispenses with the necessity of producing such figures if certain other facts are shown to exist. The rule requiring such other showing in the absence of the type of direct evidence mentioned is not a mere generality obviating the need of proof. It is a substitute formula to be looked to for the establishment of jurisdiction, if, and only if, the elements on which the formula is premised to be established.

Illinois stands for the proposition that where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. It must be noted that it is not sufficient in order to justify the application of this doctrine that the two classes are intimately connected, and it is not sufficient that some conditions affecting the respective rates have common application. It must also appear that conditions are substantially the same with respect to all factors bearing on reasonableness or that conditions incident to the intrastate transportation of freight are not more favorable than those incident to interstate transportation, which latter idea will be included in the concept of "sameness" hereinafter referred to. Logically, as well as from the language of the decision, this seems inescapable. A substantial divergence of some, though not most, of the factors would destroy the very basis of the formula. It should be further observed that in *Illinois Commerce Commission et al v. United States et al., supra*, there was involved a somewhat different factual problem than is presented here. The rates were not statewide, but covered the "Chicago Switching District." The district

was essentially a unit as far as switching operations were concerned. Movements were chiefly between local industries and involved a complete service originating and terminating within the district, although the district was intersected by the boundary between the states of Illinois and Indiana.

King et al. v. United States et al., 344 U. S. 254, 73 S. Ct. 259, 97 L. Ed. 301, determined that the Interstate Commerce Commission in prescribing intrastate freight rates for railroads under Section 13(4) of the Interstate Commerce Act, may give weight to deficits in passenger revenue. The Court held that there was no evidence which would require the Commission to treat Florida intrastate rates differently from interstate rates in southern territory. It was pointed out that whereas, in *State of North Carolina v. United States,* 325 U. S. 507, 65 S. Ct. 1260, 89 L. Ed. 1760, there was evidence to indicate that the conditions in that state were more favorable to profitable intrastate transportation of passengers than in the nation at large, the Commission's findings in the King case were to the contrary. No question was raised as to the adequacy of the evidence upon which the findings were based and thus, this case is not very helpful on the crucial problem here.

In *State of North Carolina v. United States, supra,* the principles are laid down that intrastate transportation is primarily the concern of the state; that the power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportations; that before the Commission can nullify a state rate, justification for the exercise of the federal power must clearly appear; and that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear

findings, supported by evidence of each element essential to the exercise of that power by the Commission. In the light of these principles, the Supreme Court examined the sufficiency of the Commission's findings and found them sufficient to support the order of the Commission. It stated (p. 512):

> "In effect, the Commission's holding was, and its argument is here that § 13(4) automatically requires complete uniformity in intrastate and interstate rates. That argument is in short that under our national transportation system interstate travelers and intrastate travelers use the same trains; for a state to fix a lower intrastate rate than the interstate rate is therefore an undue advantage to the intrastate passengers and an unfair discrimination against the interstate passengers. If Congress intended to permit such an oversimplified form of proof to establish 'unjust discrimination', then its requirements for a 'full hearing' was mere surplusage."

Emphasizing the necessity that the basis of federal jurisdiction appears, it is further said (p. 511):

> "* * * A scrupulous regard for mainatining the power of the state . . this field has caused this Court to require that interstate Commerce Commission orders giving precedence to Federal rates must meet a 'high standard of certainty.' Illinois Central R. Co. v. Public Utilities Commission, 245 U. S. 493, 510. Before the Commission can nullify a state rate, justification for the 'exercise of federal power must clearly appear.' Florida v. United States, 282 U. S. 194, 211-212."

Four three-judge cases, three of them of recent date and each of them affirmed on motion without opinion by the Supreme Court, touch upon the problem here to varying degrees. They are referred to in the order in which they were decided.

State of New York et al v. United States et al., D. C. N. D. N. Y., 1951, 98 F. Supp. 855, affd. 342 U. S. 882, 72 S. Ct. 152, 96 L. Ed. 662, discussed the matter of similarity of trans-

portation conditions, holding that whether similarity exists is a question of fact. It was stated that the term denotes a general likeness, an approximation, something less than an absolute identity. But the question of similarity was not involved in the way it is here. There was an attack on the similarity of services rendered New York and Connecticut commuters, and it was held that the findings of similarity of service was based upon evidence that appeared to be substantially undisputed. The opinion indicates that on the issue corresponding to the determinative one here, there were cost studies in evidence, and one of the principal disputes was whether the "train by train" method rather than the group method should be followed. The evidence adduced and the consideration by the Commission of the comparative cost items as indicated by the decision make it appear that the case is not closely in point except to indicate the general type of proof that has been offered heretofore in rate cases.

In *Louisiana Public Service Commission v. United States et al.*, D. C. E. D. La., Baton Rouge D., 1954, 125 F. Supp. 180 affd. 348 U. S. 885, 75 S. Ct. 205, 99 L. Ed. 696, rehear. den. 348 U. S. 921, 75 S. Ct. 289, 99 L. Ed 723, the question of whether the findings of the Commission were supported by substantial evidence was summarily disposed of in a paragraph of the opinion It was pointed out that the record comprised nearly one thousand pages of testimony and a great number of exhibits. The court said:

> "It is sufficient to say that the Commission had before it a large volume of substantial evidence adduced by both sides of the controversy. In reaching its conclusions it was necessary for the Commission to weigh the evidence. That was a function which peculiarly addressed itself to the expertise of the Commission."

Whether the four hundred pages of testimony in the case at bar covered the same fields as the record in the Louisiana case cannot be determined from the opinion. Certainly, the opinion does not settle the point of comparability which is determinative here.

The case of *Mississippi Public Service Commission v. United States et al.*, D. C. S. D. Miss., Jackson D., 124 F. Supp. 809 (one judge dissenting), affd. 1955, 349 U. S. 908, 75 S. Ct. 584, 99 L. Ed. 1244, directly passed upon the question of the sufficiency of the evidence contrary to the contentions of the railroad company. I cannot agree with two indications in the opinion of Judge Mize, who spoke for a majority of the three-judge court: (a) that to justify the order of the Commission it must be shown both that the disparity between rates operates as a discrimination against interstate commerce *and* that it results in injury to interstate shippers; and (b) that in order to justify such an order there must be evidence distinguishing railroads' revenues, expenses and properties as between interstate and intrastate operations. On the first point, it is probable that the use of the conjunctive, with no support from the statute, 49 U. S. C. A., 13(4), was an inadvertence. On the latter proposition, the language, to be an accurate statement of the law, would have to contain the qualification that such separate treatment would be unnecessary only if the evidence failed to indicate the substantial similarity in both areas of all factors affecting rates within the doctrine of *Illinois*. As so interpreted, and considering the comments of Judge Mize on the evidence, or lack of it, as reasons why such comparable conditions were not established in the record, the decision is meaningful and compelling here.

In a similar case, appearing to be the latest to come before

the Supreme Court, *State of North Carolina et al. v. United State set al.*, D. C. E. D. N. C., 1955, 128 F. Supp. 718, affd. 1956, 350 U.S. 805, 76 S. Ct. 45 100 L. Ed 46, Judge Parker held for the Court that the ultimate findings of the Commission were supported by the evidence. Among these ultimate findings was one corresponding to a finding now before us that "'The conditions indicent to the intrastate transportation of freight in North Carolina are not more favorable than those incident to the interstate transportation in North Carolina and in the adjoining states." It was pointed out that the Commission has held a hearing for four days at which a great volume of testimony was received. But the sufficiency of the evidence was not an issue in this case. Judge Parker points out (p. 721), "* * * there is no contention that this finding of evidentiary facts is not amply supported by the evidence in the case. It is not necessary to repeat them here; but it is sufficient to say that they fully support the ultimate findings of the Commission * * * ." The opinion in the North Carolina case does suggest, however, that there was more specific and pertinent evidence of common factors affecting rates than was before the Commission in the present case. I do not mean to discount this decision as a respected authority, but because of differences appearing in the nature of the evidence and the fact that the significant issue here was not raised in that case, I do not deem it to be controlling.

II.

It is conceded that the ultimate findings of the Commission, quoted in a footnote to Judge Pickett's opinion, support the order, since they are couched in language designed to comport with the doctrine of *Illinois* and closely follow the

form of the ultimate findings approved in the *King* case. When the subsidiary findings of the Commissoin are looked to, however, a different picture is presented, even apart from evidentiary foundations or lack of them. Except for general references to the similarity of conditions as between intrastate and interstate commerce and certain unsupported conclusions discounting the effect of the affirmative evidence adduced on behalf of those opposing the increase, the facts set out in these subsidiary findings seem to recognize a substantial difference in conditions affecting rates. The report notes, among other things, that based on annual reports filed by four of the principal respondents with the Utah Commission, it appears that the interstate freight-service ratio (freight-service expense divided by freight-service revenue) and the intrastate density (ton-miles per mile of main-line track) are as to each respondent more favorable than correspondent systemwide figures, for 1953 as shown in the report. Such figures showing a very marked difference are set out in the report. But with reference to these, the Commission adds:

> " * * * The Union Pacific and the other respondents dispute the validity of the results obtained from the application of the formula. They assert that the reports do not reflect the actual cost of operation in Utah and therefore afford no basis for comparing operating costs. One of the principal objections to the density above shown is that they were obtained by using only the miles of main track. The density results would be substantially reduced if branch-line mileage were included. The comparisons thus made are of little significance in our determination here. A more important consideration is the positive showing made upon this record that the average unit expense of servicing Utah intrastate traffic is at least as great as that of servicing interstate traffic to and from Utah."

The evidentiary basis in the record of the statement that

a positive showing was made that the average unit expense of servicing Utah intrastate traffic is at least as great as that of servicing interstate traffic to and from Utah, cannot be found in the transcript, nor can I find it referred to in the briefs of the respondents. The record seems devoid of a comparison of conditions bearing on the reasonableness of rates, except for such common factors as were held in the first North Carolina case to be insufficient in the findings to support an order. It does not seem enough for the Commission to point to evidence of admitted differences in relevant factors and to say that the differences are not as great as those opposing the increases claim, without some basis in the record upon which to premise a finding that the differences are not substantial. The fact that in arriving at density figures combination main-line and branch-line track was not considered, does not seem to render the data insignificant, since the comparison was based upon main-line track nationally as well as locally. No facts appear which make the conclusion rational that the density figures would, on any theory, represent a factor having no substantial bearing on the reasonableness of the respective rates. It does not seem enough to say that the substantial effect was not as great as both main-line and branch-line figures had been presented, or to ignore that effect because of vague "average unit expense" figures, neither qualitatively nor quantatively compared therewith.

The subsidiary findings refer to an exhibit submitted by the Utah Commission portraying various operating statistics of the Denver and Rio Grande Western in Utah and Colorado, and for the entire system. This data on its face appears clearly to support a conclusion contrary to that arrived at by the Interstate Commerce Commission. The Commission dismisses the

evidence by reference to its action in *Kansas City Chamber of Commerce v. Atchison, T. & S. F. Ry Co.*, 164 I. C. C. 302, quoting its determination there, that the method of allocating revenue and expenses to a particular state was open to so many serious objections that the results obtained were unreliable. These objections were not developed in the evidence here, and no more reliable data were presented. In a similar summary manner, the study of the Utah Commission based on carload waybill statistics for 1952 showing the Utah intrastate ton-mile revenue as compared with the revenue per ton-mile on interstate shipments originated during that year, separated as to the principal commodity groups, was dismissed as "not determinative of the issues before us", due to "marked differences in lengths of haul as between intrastate and interstate traffic."

The prevailing opinion places stress upon the evidence that there is no discrimination in the handling of intrastate and interstate freight shipments, since they are both handled on the same trains, by the same crews, and by the same departments and it is stated that "Under such conditions, the contention of the plaintiffs has been rejected by the courts." I cannot find that any court has gone to the extent of holding that such common treatment furnishes a basis of applying intrastate rate increases in the absence of evidence showing similar conditions with reference to all factors affecting rates.

It is true that Mr. Kroll testified on behalf of the railroads that no distinction is made between the two types of traffic; that traffic is intermingled as between interstate and intrastate; that the same crews, the same clerks, and the same trains haul interstate and intrastate traffic; and that intrastate shipments and interstate shipments move

under "identically the same conditions". If an intrastate case can be made on such general testimony, largely within common knowledge, a hearing should not be necessary. Yet as far as the similarity of conditions affecting costs (as distinguished from actual rates charged without reference to cost) is concerned, this seems typical of testimony on which reliance must be placed if the order is upheld.

Other evidentiary matters mentioned in the prevailing opinion as a foundation for the Commission's conclusions are believed insufficient to permit plausible inferences to that effect in view of the record as a whole. Such disparity of rates as were shown are in both directions, and it is well established that mere disparity of rates establishes no sufficient basis for such an order. The railroads' need for additional revenue in general is beside the point. That the total yearly loss to the railroads caused by the failure to grant the requested increase in Utah was estimated at $1,880,347 means that a percentage increase applied to an existing rate theoretically will yield increased revenue. This has no probative force in regard to the problem at hand. To the extent that the record indicates that earnings on the railroads' investments in Utah are below the national average, their more favorable position locally from a cost standpoint in respect of density of traffic and the large percentage of intrastate freight carried in gondola cars from mines may not be ignored.

That economic conditions in Utah as of 1950 have improved greatly over the preceding period seems to have no determinative effect on a Section 13 case, since it is not the ability of intrastate traffic to pay more than its fair share that is involved, but whether the intrastate rate is so low as to be an economic burden on interstate commerce. Furthermore,

there seems much force to the plaintiffs' argument that Utah's present economic status, if anything militates against the Commission's conclusion since it suggests that in past years, while Utah's traffic has been essentially agricultural and relatively unproductive of revenue, its rates have moved up as a result of increases corresponding to nation-wide increases, and that now its economy has changed to predominantly mining and industry, the relative productivity of the traffic to the railroads would make the recent nation-wide increases fairly inapplicable intrastate. Be this as it may, and conceding that evidence of general economic conditions locally may be helpful on other phases of a rate case, they do not tend to show that all factors affecting rates are substantially the same as between interstate and intrastate commerce for the purpose of the doctrine announced in *Illinois*. The figures on percentage of return on net investment of the railroads in Utah cited in the majority opinion follow no pattern logically adaptable to the Commission's conclusion. Thus, the latest percentage, 3.82% in 1953, is more than in 1949 and more than in 1951 but less than in 1948, 1950 and 1952. Comparative revenue figures per ton-mile, covering interstate and intrastate traffic lumped together without taking into consideration differences affirmatively shown to exist in factors affecting the respective costs, again may have a bearing on other phases of a rate case, but furnish no rational basis for concluding that all factors affecting costs are substantially the same for interstate and intrastate traffic, for they go no further than to suggest, if anything, a disparity in rates which admittedly is not enough. *North Carolina v. United States*, 325 U. S. 507, supra.

Singly or in combination these factors, when viewed in context with the whole record, are believed not to supply a rational basis for the conclusion that the conditions attendant

the intrastate transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and adjoining states.

III.

Three unwarranted assumptions would seem necessary to logically sustain the decision of the Commission. One would be that prior to the application of the 15% increase nationwide, intrastate and interstate rates in Utah were in balance with reference to the cost-revenue factor so that each furnished its fair share of the total revenue needs. If this presumption could be applied in the absence of evidence in the record to support it, or in view of the kind of evidence before us, the making of a rate case would be exceedingly simple, i. e. (a) the rates, intrastate and interstate in Utah prior to the application of the nation-wide increase affecting interstate commerce provided in Ex Parte 175 were reasonably in balance; (b) interstate rates have been increased 15%, and thus, intrastate rates are out of line by this percentage; (c) by increasing intrastate rates 15% the two classes are restored to balance so that each furnishes its fair share of general revenue requirements.

Another presumption would have to be indulged: that between the time of the last simultaneous increase, or at least subsequent to the increase under Ex Parte 175, no new factors affecting costs have developed to throw the presumed balance out. The basis of this is furnished, if at all, by the testimony concerning the intermingling of interstate and intrastate traffic, which, as has been pointed out, is insufficient.

And there is another assumption that is required if the deficiencies are to be avoided. On the whole record it appears

without dispute that there are different factors operating in progressive measure to influence intrastate rates as distinguished from rates intrastate from the standpoint of the revenue-cost ratio. The rapid development of the industrial and mining economy of Utah in relation to the nation as a whole, and its established incidents, including increasing traffic density, underscore the dissimilar conditions. No evidence to disprove this divergence nor to define, limit or measure its effect appears. The Commission in its report, however, as above pointed out, dismisses the significance of these factors and other studies directly measuring the differences, not on the basis of any opposing studies or evaluations introduced at the hearing but, for example, in one instance by a general conclusion as to comparative unit costs finding no support in the evidence, and in another instance by referring to its determination in an entirely different case.

May it be assumed, without evidence in the record which would furnish a rational basis in and of itself, that as an agency presumably equipped or informed by experience to deal with a specialized field of knowledge, its conclusions are valid and unassailable here? If this be so, the pattern for virtually automatic application of nation-wide rate increases to intrastate commerce would be complete.

But no decision of the Supreme Court countenances any such result. *Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431, expressly rejects the contention that "expertness" may take the place of evidence. As recognized by Judge Pickett, *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456, authorizes the Court to set aside an order when it cannot conscientiously find that the evidence supporting it is

substantial, when viewed in the light that the record furnishes, including the body of evidence opposed to the agency's views. In a recent commentary on the authorities in this field appearing in Harvard Law Review, April 1956, P. 1020, et seq., Professor Louis L. Jaffee expresses it as follows (P. 1027):

> " * * * Judicial review is designed, as has been said, to make sure that there is record evidence which provides a rational or logical basis for the finding and for the consequent presumption that the finding was in fact the product of reasoning from evidence. This must mean evidence in the case and in the context of the case. To abstract out of a case that part of the evidence which can be made to support a conclusion is to imagine an abstract case, a case that was never tried. * * * "

And he further comments (p. 1040):

> "Courts usually demand that the particular agency convince the Court that its 'putative' expertness is relevant to the finding in question and even then takes this expertness as but one factor in the agency decision which must run the gauntlets of its common sense."

Chief Justice Hughes in *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 58 S. Ct. 852, 82 L. Ed. 1287, says that substantial evidence means "such relevant evidence as a reasonable man might accept as adequate to support the conclusion."

The requirements of the Interstate Commerce Act, 49 U.S.C.A. 13(4), that a "full hearing" be had, coupled with the provisions of the Administrative Procedure Act, 5 U. S. C. A. 1001, et seq., negative the idea that the Interstate Commerce Commission, without evidence of substantial similarity of all factors affecting rates, and in the face of evidence showing dissimilar conditions, can, solely on the basis of its previous experience and authority, ignore the record and come to a de-

termination independent of it. See also *Amarillo-Borger Express, Inc., et al., v. United States,* D. C. N. D., Tex., Dallas D., 1956, 138 F. Supp. 411. The legal effect of evidence is a question of law and a finding without evidence is beyond the jurisdiction of the Commission. Where the party affected is entitled to a hearing, the Interstate Commerce Commission cannot base an order establishing a rate on the information it has gathered for general purposes; the order must be based on evidence produced in the particular proceeding. *Interstate Commerce Commission v. Louisville and Nashville Railroad Company,* supra.

In reading the transcript before the Interstate Commerce Commission one may detect impatience on the part of some of the witnesses espousing the increase at any suggestion that they were called upon to produce a quantum of proof going to anything beyond an intimate connection between interstate and intrastate traffic in Utah and the differences in rates without the application of the 15% increase to intrastate traffic. In the argument before this Court the thesis was pursued that on the basis of common knowledge as to conditions in every state in the Union it could be said that all factors influencing rates were the same, and it was intimated that without evidence these matters of common knowledge would themselves justify the application of similar increases to the two classes of traffic. I fear that this is where the order of the Interstate Commerce Commission is leading us; that, henceforth, if such orders be approved now that the problem has been squarely raised (as it does not appear to have been before) there will be no use for hearings before either the state commissions or the Interstate Commerce Commission with regard to intrastate rates, except as a mere formality in approval of nation-wide increases.

What is substantial evidence is a matter on which there can be understandable differences of opinion for at best this is not a precisely measureable quantity or quality of evidence. However, it is the duty of each member of the court to determine whether minimum jurisdictional requirements have been met. I do not believe that they have been here, and with due regard for the considered majority view to the contrary, there can be no question at least but that the issue is worthy of focused consideration. The amount of money involved is considerable. It is vital that the railroads' rates, both intrastate and interstate, be adequate, and that the former should bear its full share of general revenue needs, but the relationship between state and federal governments is also important and delicate; and it is important that no rules be laid down which will impair that relationship contrary to the principles which Congress in the light of court decisions has laid down. To thus regard it will place no roadblock in the path of the railroads in obtaining adequtae rates intrastate. It will establish some signals which I believe should be observed for the protection of our entire system. It neither compromises nor weakens legitimate federal power in the field of commerce to expect that the basis for the exercise of that power be shown affirmatively by substantial evidence. Such insistence may appear to be a protection solely to the public one day, to the state on another, or to the railroads on yet another; but the by-passing of such requirement can, in the long run, injure all and may, through reaction, impair the power itself.

I would vacate the order of the Interstate Commerce Comsion and enjoin the application of the increased intrastate rates until, if at all, substantial evidence is presented before the Interstate Commerce Commission furnishing a rational basis for the conclusion that conditions under which intrastate and

interstate traffic move in Utah are substantially the same with respect to all factors bearing on the reasonableness of the rates.

Dated this 23rd day of May, 1956.

/s/ A. SHERMAN CHRISTENSON,
United States District Judge.

Filed in United States District Court, District of Utah
June 18, 1956

O. K. Clay, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL ACTION NO. C-8-56

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants;

and

UNION PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, BAMBERGER RAILROAD COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, SALT LAKE-GARFIELD AND WESTERN RAILROAD COMPANY, TOOELE VALLEY RAILWAY COMPANY, and UTAH RAILWAY COMPANY,

Intervenors.

FINDING OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for hearing on April 9, 1956, before a statutory three-judge court consisting of Hon. John C. Pickett, Judge of the United States Court of Appeals for the Tenth Circuit, and the Hon. Willis W. Ritter and Hon. A. Sherman Christenson, District Judges of the United States District Court for the District of Utah; the plaintiffs being represented by Raymond W. Gee, Assistant Attorney General of the State of Utah, Calvin L. Rampton and

Keith E. Sohm; the defendants being represented by A. Pratt Kesler, United States Attorney for the District of Utah, and C. H. Johns, Attorney for the Interstate Commerce Commission; and the intervening railroads being represented by W. H. Fitzpatrick and A. U. Miner; and the Court having received in evidence and considered the record of evidence submitted to and produced before the Interstate Commerce Commission, and having heard the arguments of counsel and considered their respective briefs submitted in connection therewith, and being fully advised in the matter, now make the following:

FINDINGS OF FACT

1. The plaintiff Public Service Commission of Utah is a statutory commission created by and existing under the laws of the State of Utah, and is vested with power and authority over intrastate freight rates of common carrier railroads within the State of Utah, except as such rates may cast an undue burden upon or discriminate against interstate commerce, and except as such rates may therefore be regulated and controlled by the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act, pursuant to which act the orders involved herein were issued by the Interstate Commerce Commission; the plaintiff Utah Citizens Rate Association is a non-profit corporation organized under the laws of the State of Utah, having as its members various shippers of railroad freight within and from the State of Utah.

2. That during the year 1951 in a proceeding designated as "Ex Parte 175", wherein Class I Railroads of the United States sought an overall increase in interstate freight rates, the Interstate Commerce Commission undertook an investiga-

tion with respect to the level of such interstate freight rates, and after extended hearings and interim precentage increases, said commission on April 11, 1952, granted to all of said railroads increases totalling 15 per cent on interstate freight rates, such increases being subject to certain exceptions and hold-downs.

3. Railroads operating in the State of Utah made application to the Public Service Commission of Utah requesting increases in intrastate freight rates comparable to and in the same percentage amounts as had been granted by the Interstate Commerce Commission on interstate rates in "Ex Parte 175." After hearing thereon, the Utah Commission refused to grant the requested intrastate increases, one of the main bases of the Utah Commission's refusal being that the railroads had made no separation between their interstate and intrastate costs and expenses, the railroads contending that such items of expense were so inextricably bound together as to be impractical, if not impossible, of separation.

4. Section 13 proceedings were instituted by the railroads before the Interstate Commerce Commission; and pursuant thereto, the Interstate Commerce Commission, under its Docket No. 31484, entered into an investigation of Utah intrastate freight rates and charges. Commencing on May 20, 1954, a full and complete hearing was had before an Interstate Commerce Commission examiner, at which hearing a great amount of evidence, both oral and documentary, was introduced both by the railroads and by protestants who appeared, including the plaintiffs herein. After hearing and co. idering the same, the said examiner on March 11, 1955, issued a report and order in which he recommended to the Interstate Commerce Commission that it issue its order requiring that freight rates intra-

state in Utah be raised as requested, with a few minor exceptions. The plaintiffs herein thereupon filed with the Interstate Commerce Commission their exceptions to the report and order as proposed by the examiner. Pursuant to request of the parties, oral arguments, with respect to said proposed order and said exceptions taken thereto, were heard before the Interstate Commerce Commission on July 11, 1955.

5. Under date of October 17, 1955, the Interstate Commerce Commission issued its report and order in said matter, wherein it found, with certain exceptions, that the Utah intrastate rates and charges were abnormally low; that conditions incident to intrastate transportation in Utah were not more favorable than those incident to interstate transportation in said state; that traffic thereunder failed to produce its fair share of earnings required to yield the railroads sufficient revenue to provide adequate and efficient railway transportation service to accomplish the purposes of the Interstate Commerce Act, and that Utah intrastate rates cast an undue burden upon interstate commerce. The Interstate Commerce Commission also found and ordered and directed that the undue burden and unjust discrimination should be removed by applying to the Utah intrastate rates and charges on like intrastate traffic the percentage increases authorized on interstate traffic in Ex Parte 175, with the proviso "that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to and from Utah for like or greater short line distances over the same lines of railroad, except in instances where the interstate rates, and not the intrastate rates, are designated as published to meet motor carrier competition."

6. Said order of the Interstate Commerce Commission further provided that the Utah Commission would be allowed

thirty days to put said increases into effect; and unless the Utah Commission notified the Interstate Commerce Commission within the thirty days that it would authorize and permit such increases, that a further order would be issued by the Interstate Commerce Commission, putting said rates into effect.

7. Petition for rehearing was filed by plaintiffs and denied by the Interstate Commerce Commission.

8. The Utah Commission did not authorize the increases within the time provided in said order, nor within an authorized extension of said time; and under date of February 8, 1956, the Interstate Commerce Commission issued its further order, wherein the railroads were directed by said Interstate Commerce Commission to put increased rates in effect in Utah pursuant to its order of October 17, 1955, and to publish and file its tariffs, and by such tariff issuance to make the 15 per cent increase effective on Utah intrastate freight rates as of March 13, 1956, upon one day's notice to the public and the Interstate Commerce Commission.

9. The present suit was brought by Public Service Commission of Utah and Utah Citizens Rate Association against United States of America and Interstate Commerce Commission under the provisions of Title 49, U. S. C. A., Section 17(9) and Title 28, U.S.C.A., Sections 1336, 1398, 2284, 2321, 2322, 2323, 2324, 2325 and pursuant to Title 5, U. S. C. A., Section 1009, to enjoin, annul and set aside the report of the Interstate Commerce Commission dated October 17, 1955, and the order of the Interstate Commerce Commission dated February 8, 1956. The railroads operating in the State of Utah, who had been named as parties respondent in the Commission's proceedings in Docket No. 31484, intervened in the defense of the report and orders.

10. On March 9, 1956, the United States District Court for the District of Utah, both the Hon. Willis W. Ritter and the Hon. A. Sherman Christenson concurring therein, issued a temporary restraining order restraining the Interstate Commerce Commission and the intervening railroads from putting such increased rates into effect intrastate within the State of Utah pending hearing upon the merits before a full three-judge court. Prior to commencing trial on the merits on April 9, 1956, it was stipulated by all parties that such restraining order might remain in effect as an interlocutory injunction pending hearing and decision upon the merits, and it was so ordered by this Court.

11. A three-judge court was convened pursuant to statutory provisions (Title 28, Sections 2284 and 2325). The record upon which the Commission's report and order of October 17, 1955, and February 8, 1956, are based, was introduced in evidence and considered by the court in reaching its decision.

12. At the opening of the trial the plaintiffs offered to introduce in evidence the record of proceedings made before the Public Service Commission of Utah in the hearing held by it upon the railroad's request to increase intrastate freight rates, prior to the 13th Section hearing before the Interstate Commerce Commission. Defendants and intervenors objected to the introduction of such record as made before the Utah Commission, because no part thereof had been introduced in any of the proceedings had before the Interstate Commerce Commission in said 13th Section hearing. The Court reserved ruling upon the admissibility of the latter record, and the Court now finds from the record as introduced before the Interstate Commerce Commission that no part of such proceedings before the Utah Commission were introduced or offered in

evidence in the proceedings before the Interstate Commerce Commission, and the Court therefore finds that said record as made before the Utah Commission is irrelevant and not proper to be considered herein; and this Court in arriving at its conclusions herein has not considered the same.

13. The plaintiffs made no claim that the findings of the Interstate Commerce Commission did not support the conclusions of, and the orders as issued by the Interstate Commerce Commission. The plaintiffs asserted that the findings of the Interstate Commerce Commission were not supported by substantial evidence.

14. In finding that existing Utah intrastate rates cast an undue burden upon and discriminated against interstate commerce, the Interstate Commerce Commission did not rely entirely upon the disparity in rates. The evidence in the record shows that there is no distinction in the handling of interstate and intrastate freight shipments. They are both handled on the same trains and by the same crews; the same accounting department, the same traffic department, and the same facilities are used in the dispatch and receipt of both shipments. The railroads' general need for additional revenue was established in Ex Parte 175. The evidence produced before the Interstate Commerce Commission in this case was that the earnings on investments of Utah railroads are below the national average. The economic ability of Utah traffic to bear the 15 per cent increase found necessary in Ex Parte 175, was shown. The economic conditions in Utah in 1950 had improved greatly over the preceding period, both actually and relatively. Wages were higher than the national average; higher wages and costs of operation which the railroads had to pay in Utah and elsewhere, were shown; there had been a substantial increase in property investments of

railroads operating within the state, while there was a decrease in net operating income. The cost of handling an intrastate shipment was shown to be as great, if not greater, than the handling of interstate freight. The record shows that in 1952 the revenue per ton mile of railroads in the United States was 1.43c; in the Western District, 1.393c; and in the Mountain Pacific States, which includes Utah, 1.398c per ton mile; and in the State of Utah, on intrastate and interstate traffic, 1.258c per ton mile. The total annual loss to the railroads caused by the failure to grant the requested increase in Utah was estimated by both plaintiffs and defendants, including the intervening railroads, to be approximately $1,880,347.

15. The report and findings of the Interstate Commerce Commission herein (297 I. C. C. 87) is hereby adopted by reference and made a part of these findings of fact. The findings in that report and the orders entered thereunder are entirely proper and within the scope of the statutory authority of the Commission, and such findings of the Interstate Commerce Commission are adequately supported by substantial evidence.

16. Plaintiffs' contention that the order relating to the Utah intrastate rates is invalid because the flat percentage increase of 15 per cent in Ex Parte 175, with a saving clause, was contrary to law, is without merit and amounts to a collateral attack upon such Ex Parte 175 proceedings.

17. There is no basis in fact which would justify the granting of an injunction as prayed for.

From the foregoing findings of fact the Court make the following:

CONCLUSIONS OF LAW

1. This Court his jurisdiction to determine the lawfulness of the report and orders of the Interstate Commerce Commission here involved.

2. The Interstate Commerce Commission, in making such findings and report and orders as based thereon, was acting within the authority granted to it by the Congress of the United States in the Interstate Commerce Act as amended, and the orders of the Commission are not beyond its statutory powers in any respect, are not arbitrary and are not based on findings or conclusions which are erroneous in any respect.

3. The validity of the Commission's order in Ex Parte 175 is not subject to a collateral attack herein.

4. The costs and expenses incident to the handling of intrastate and interstate traffic are intimately, if not inextricably, bound together; and it is not necessary that a separation be made between such costs and expenses as to interstate and intrastate traffic for the purposes of the Commission's investigation and the order as entered by it herein.

5. The Commission's findings are adequate to support its order.

6. The findings, report and orders of the Interstate Commerce Commission are supported by substantial and probative evidence.

7. The Commission's report and order of October 17, 1955, and its orders dated January 9, 1956, and February 8, 1956, are valid in all respects.

8. The interlocutory injunction as granted upon stipulation of the parties on April 9, 1956, should be dissolved.

9. The complaint of plaintiffs should be dismissed with prejudice and at plaintiff's costs.

Dated this 13 day of June 1956.

JOHN C. PICKETT,
Circuit Judge

WILLIS W. RITTER,
District Judge

Filed in United States District Court, District of Utah
June 18, 1956

O. K. Clay, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL ACTION NO. C-8-56

PUBLIC SERVICE COMMISSION OF UTAH and UTAH CITIZENS RATE ASSOCIATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants;

and

UNION PACIFIC RAILROAD COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, BAMBERGER RAILROAD COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY, SALT LAKE-GARFIELD AND WESTERN RAILROAD COMPANY, TOOELE VALLEY RAILWAY COMPANY, and UTAH RAILWAY COMPANY,

Intervenors.

FINAL DECREE

This cause came on regularly for hearing on April 9, 1956, before the Hon. John C. Pickett, Judge of the United States Court of Appeals for the Tenth Circuit, and the Hon. Willis W. Ritter and the Hon A. Sherman Christenson, District Judges of the United States District Court for the District of Utah, who constituted a special statutory three-judge court which was convened pursuant to the provisions of Title 28, U. S. C. A., Section 2325, upon a complaint brought by plaintiffs above named, to enjoin, annual and set aside a decision, report and

orders of the Interstate Commerce Commission in a proceeding entitled "Utah Intrastate Freight Rates and Charges, Docket No. 31484" (297 I. C. C. 87); the matter was heard upon the evidence taken before the Interstate Commerce Commission and the report and orders of the Interstate Commerce Commission, as well as upon arguments and briefs of counsel for all parties; and the cause having been submitted for final decree, and the Court having made its findings of fact and conclusions of law, which are filed herewith.

NOW, THEREFORE, upon the basis of said findings of fact and conclusions of law, and for the reasons set forth by the majority opinion of the Court heretofore filed, it is, upon motion of counsel for the defendants and counsel for the intervening railroads.

ORDERED, ADJUDGED AND DECREED that the interlocutory injunction heretofore entered and granted in the above-entitled cause on April 9, 1956, be, and the same is set aside and dissolved. The request of plaintiffs for a permanent injunction and order annulling and setting aside the orders of the Interstate Commerce Commission is denied, and the plaintiffs' complaint is hereby dismissed with prejudice and with costs to be assessed against the plaintiffs.

Dated this 13 day of June 1956.

JOHN C. PICKETT
Circuit Judge

WILLIS W. RITTER
District Judge